

**MINUTES
of the
SEVENTH MEETING
of the
LEGISLATIVE STRUCTURE AND PROCESS STUDY TASK FORCE**

**July 23-24, 2007
Room 307, State Capitol
Santa Fe**

The seventh meeting of the Legislative Structure and Process Study Task Force was called to order by Richard E. Olson, co-chair, on July 23, 2007 at 10:20 a.m. in Room 307 of the State Capitol in Santa Fe.

Present

Thomas A. Donnelly, Co-Chair (July 24)
Richard E. Olson, Co-Chair
Rep. Janice E. Arnold-Jones
Rep. Ray Begaye
Max Coll
Linda M. Davis
Marie Eaves (July 23)
William H. Humphries
Bill King
Rep. Larry A. Larrañaga
Willard Lewis
Sen. Steven P. Neville
Sen. Gerald Ortiz y Pino
Sen. Nancy Rodriguez
Rep. Thomas C. Taylor
Anthony Williams
Rep. Peter Wirth

Advisory Members

Rep. Donald E. Bratton
Sen. Stuart Ingle (July 24)

Absent

Sen. Mark Boitano
Charles Dorame
Tommy Jewell
Judy K. Jones
David McCumber
Brian McDonald
Sen. Cynthia Nava
Sen. William H. Payne
Murray Ryan
Rep. Henry Kiki Saavedra

Marilyn O'Leary
Kim Seckler

(Attendance dates for members attending part of the meeting are shown in parentheses.)

Senators Ben D. Altamirano and Linda M. Lopez also attended the task force meeting.

Staff

David Abbey, Director, Legislative Finance Committee (LFC)
Raúl E. Burciaga, Assistant Director for Drafting Services, Legislative Council Service (LCS)
Cathy T. Fernandez, Deputy Director, LFC
Renée Gregorio, LCS
Ric Gaudet, LCS
Manu Patel, Deputy Director, LFC
Paula Tackett, Director, LCS
John Yaeger, Assistant Director for Legislative Affairs, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of handouts given by meeting presenters are in the meeting file.

Monday, July 23

Committee Business

Review of Draft Proposals

Mr. Yaeger reviewed for the task force a proposal that would eliminate all advisory members of interim committees, except for those members appointed as voting members on the Legislative Council. He said that is how the interim worked 20 years ago. He clarified that members of the Legislative Council are prohibited from serving as voting members of any other council-appointed or council-created committee, so members of the council began serving as advisory members during the 1980s. However, since then, advisory membership on interim committees has expanded tremendously.

Senator Ortiz y Pino asked what is the problem that this proposal will solve. Mr. Yaeger said that most members are spread too thin in their interim schedule, and that the number of members on committees has become nearly unmanageable. Senator Neville agreed, saying that most minority members of the Senate serve on six to nine interim committees.

Senator Altamirano said that with 42 members and more than 20 interim committees, the Senate has a hard time filling all those positions. He said that another problem is that members come to interim committees and then leave shortly after arriving; that issue makes legislative leadership very uncomfortable. He also spoke in favor of cutting down advisory membership on interim committees.

Mr. Coll said that all advisory memberships on interim committees should be abolished, and that members should be allotted a certain number of meeting days they can attend during each interim as temporary advisory members.

Senator Altamirano said that the Legislative Council recently adopted a policy to allow members to attend four meetings of their choice as a pilot program. Mr. Williams commented that allowing legislators to attend extra meetings without reducing advisory memberships actually compounds the problem.

Representative Arnold-Jones said that it would be beneficial to consolidate some committees, since they have overlapping jurisdiction.

Mr. Olson asked what was the fate of the task force proposal to the council to align membership of the standing judiciary committees with the interim courts committee. Mr. Yaeger said that the council rejected the idea. He also said that staff will present some possible adjustments to the current interim committee structure for the task force to consider at its next meeting.

Review of Letter to Legislative Council

Mr. Yaeger presented a draft letter to the Legislative Council that leaves to the council the questions overtime pay for and background investigations of session employees. The task force had identified these issues previously, but felt that it was outside its purview to explore the issues further. The task force directed staff to send the letter to the council.

The minutes of the June 15, 2007 meeting of the task force were approved.

Legislative Override of Vetoes: Background and Consideration of Options

Ms. Tackett described for the task force the history and process of legislative veto overrides. She began by reviewing the governor's veto power. She indicated that the governor has the ability to veto, pocket veto or partially veto language in any bill that contains an appropriation. The legislature can override vetoes during the same or next regular session of a given legislature. Thus, attempts to override partial vetoes in appropriations bills have been seen as pointless, since the money has usually been spent or committed by the time the legislature meets to address the issue.

There have been many attempts to override vetoes, but few have actually succeeded. Ms. Tackett described most of the veto overrides in New Mexico history that occurred in 2002, 1999, 1959, 1931 and 1915. One notable example was the legislature's override of a bill relating to developmentally disabled persons during a special session in 1999. Normally, veto overrides are not allowed in special sessions, but since the governor had included in his proclamation calling the special session the issue of developmental disabilities, the legislature decided that overriding a developmental-disabilities-related bill was within the purview of that particular session.

Ms. Tackett stated that most state legislatures override vetoes rarely. Most states require some sort of super-majority. New Mexico requires two-thirds of the members present to override a veto. Some states have veto-override sessions shortly after the end of a regular session. She mentioned Louisiana, which has an automatic override session after any veto, unless the majority of either house states in writing not to convene the session.

Ms. Tackett then presented a few options for the task force to consider, including:

- 1) convening automatic veto-override sessions;
- 2) extending the amount of time the governor has to sign or veto legislation;
- 3) allowing veto overrides during special sessions; and
- 4) modifying the governor's line-item veto powers.

Representative Larrañaga asked whether a veto that changes the focus of an appropriation is still valid. Ms. Tackett responded that it depends on how it is done. She said that courts have ruled that if the governor vetoes language from a program, the money appropriated is still there, but the language is not. The executive can then use that money for something else within the scope of the particular appropriation. She reiterated that the power of a partial veto is the power to destroy, not to create. She mentioned a situation in which the governor creatively crossed out some language, the net result being that the Department of Transportation received certain funding for two extra years without having to comply with the reporting requirements intended by the legislature to be a condition precedent to the subsequent years' appropriations.

Representative Larrañaga said that, in most cases, the only remedy is a lawsuit, since waiting one year to override a veto means the money is already spent. Ms. Tackett said that a veto-override session could make overrides more practical. She also said that if a legislator decides to sue the governor over an improper partial veto, the state does not pay for that lawsuit, the legislator does.

Mr. Olson asked whether the legislature is able to override partial vetoes. Ms. Tackett said that it does have that power, but she cannot recall if it has ever happened.

Mr. Williams asked if proposed changes to veto provisions in the constitution have ever been presented to the voters. Ms. Tackett responded that she did not recall any such proposed change, except to change the amount of time the governor has to sign legislation.

Representative Wirth said one of the governor's recent "creative" vetoes brings up a significant problem that cannot be resolved under the current structure of legislative-executive power. The three degree-granting higher educational institutions benefitted significantly from a particular veto, and it would be nearly impossible for the legislature to override a veto that helped such powerful and influential institutions. The other option, suing the governor for abuse of his veto power, is equally difficult, since any legislator suing would have to cover the costs of litigation without any public money. He also said that while the universities benefitted, Santa Fe Community College and the New Mexico School for the Deaf took a huge financial hit.

Mr. Coll suggested that veto-override sessions be instituted, and recommended that the veto power of the governor found in Article 4, Section 22 of the Constitution of New Mexico be changed to assert that the "veto power is only the power to destroy legislation", and that the governor can only line-item veto dollars, and not language.

Representative Taylor suggested that all special appropriations be put into a separate HB 2, Jr., bill, and that the process become transparent.

Representative Bratton said that, in recent years, the governor has directed state agencies to submit flat budgets, so as to appear fiscally prudent. In fact, agencies generally end up getting their expansion requests put into HB 2, Jr. He said that the legislature should not provide recurring funding to agencies unless they put that funding into their budgets. He also said he favors having a veto-override session that is triggered by any veto. Additionally, veto-overrides should be affirmatively allowed in all special sessions.

Senator Neville said he likes the idea of veto-override sessions. He asked what limitations there are on the governor's line-item veto. Ms. Tackett said that the governor may only line-item veto if there are appropriations in a bill. The governor can veto any language in such a bill.

Representative Arnold-Jones lamented that the checks and balances between the executive and legislative branches have been lost. She asked staff to research the possibility of setting up a legislative legal fund.

Mr. Lewis cautioned against taking away the line-item veto power completely, since it is a very important tool.

Mr. Williams said that having routine veto-override sessions will change the behavior of both the governor and the legislature, as this type of session would probably take care of some of the problems the task force is discussing. He also said that the task force could expect little executive support of any change in the governor's veto power.

Mr. Coll said the task force needs to recommend changes that will benefit both the executive and legislative branches.

The task force directed staff to present draft proposals on a veto override session, allowing veto overrides during special sessions, extending the time the governor has to consider legislation and modifying the governor's line-item veto power.

Redistricting Reforms to Maximize Competitive Districts

Brian Sanderoff, president, Research and Polling, Inc., discussed with the task force recent legislative race competitiveness and possible reforms it could consider. In the 2004 election, 42 House districts were essentially unopposed. Of the total 70 seats in the election, only five races were truly competitive (defined as a margin of victory of less than five percent). In the Senate, 25 of 42 seats went unopposed in 2004, and only one race was truly competitive.

Mr. Sanderoff covered recent legislative redistricting, the most recent of which occurred in 2001. That year, the legislature sent several House redistricting bills to the governor, who kept vetoing them. The issue finally ended up in court, which kept most of the House districts

intact, and made a few changes to districts to address the federal Voting Rights Act of 1965 issues.

Mr. Sanderoff said there are several redistricting guidelines legislatures should follow, according to the Voting Rights Act of 1965. These include equal population, minority voting fairness, compactness, contiguity and communities of interest. Mr. Sanderoff noted that, until recently overturned by the United States Supreme Court, states had constructed legislative districts in certain areas mostly based on obtaining minority districts. The court weakened the Voting Rights Act somewhat with this decision, and further allowed that redistricting is an inherently partisan process. States can consider race in redistricting, but they cannot use it as a sole criterion for drawing districts.

Mr. Sanderoff discussed the possible use of redistricting commissions to draw legislative districts. He said that an independent commission might draw boundaries completely different from what the legislature might do, and competitiveness might increase. However, he said that the geographic composition of the state precludes competitive districts in many areas. He thinks the areas that might benefit most from some sort of "independent" redistricting are Albuquerque and Las Cruces. He also cautioned against the political party in power trying to maximize its strength in its districts. He said that when one district is strengthened for a political party, the adjacent district is often strengthened for the opposing party, making those seats even less competitive.

Senator Ortiz y Pino asked whether New Mexico has ever seriously considered creating a redistricting commission, and asked why the state does not start its redistricting process earlier. Mr. Sanderoff said that he has not seen an attempt to create a redistricting commission since he became involved in the redistricting business in 1981. The problem with starting earlier is that the actual precinct data will not be available until April 2011, just 19 months before the next election in which the districts need to be redrawn.

Senator Altamirano asked whether the state can redistrict along political party lines. Mr. Sanderoff responded that the United States Supreme Court has ruled that political considerations in redistricting are allowed, as long as minority votes are not diluted. Put another way, partisan gerrymandering is more legal than racial gerrymandering, as long as it is not egregious. Senator Altamirano then asked about how important compactness of districts is. Mr. Sanderoff said that compactness is difficult to maintain when redrawing districts. But, he said, New Mexico's districts are very compact compared to other states' districts.

Mr. Williams asked what causes other states to use redistricting commissions. Mr. Sanderoff said that sometimes it is from a voter initiative due to frustration from an unresponsive legislature. Legislators with safe seats tend to be more isolated from their constituents than those in competitive districts. He said that the political party that is not in power usually benefits the most from redistricting reform.

Four-Year House Terms and Staggered Terms

Mr. Burciaga presented information to the task force regarding possible implementation of four-year House terms and staggered terms for legislators. Making terms of representatives extend from two years to four years would be fairly simple, if approved by the voters in a constitutional amendment. If those terms, or those of senators, are staggered, however, the situation gets much more complicated. When district boundaries are redrawn every 10 years, staggered terms of legislators make it difficult to figure out how to deal with the members who are elected for four years but may no longer have a district to represent during the final two years of their term. Some states have dealt with that problem by assigning those legislators to new districts for the remainder of their term, even though they may not reside in that district.

Senator Neville asked what would be the advantage of staggering terms, especially since most races go unopposed. Mr. Burciaga said that proponents of staggered terms argue that institutional stability is improved and that there is merit in ensuring that at least some portion of the body is up for election every two years.

Mr. Lewis asked how many states have four-year House terms. Mr. Burciaga said there are five such states.

New Member Orientation Reforms

Mr. Yaeger reminded the task force that it has previously recommended that new legislative members receive longer orientations, with more substantive training. He reviewed some of the new member orientations given in the past 20 years. He noted that orientations are important, not only for the information received, but for the collegiality that is initiated at those sessions. He mentioned that one problem with lengthening the new member orientations is that those new members are not currently compensated for their time during the orientation.

Mr. Coll said that the legislature could easily make an appropriation for the purpose of compensating new legislators, and the constitution does not need to be amended for that purpose. He said the new members would have to be compensated at the rate set by law for public members attending state meetings, rather than the legislative per diem.

Senator Ortiz y Pino said that if the legislature takes a break early in the session, as discussed in earlier task force meetings, some orientation work could take place during that break period.

Representative Wirth suggested that legislators-elect be allowed to attend interim committee meetings, since that would introduce new members to many issues and future colleagues.

Representative Bratton said that orientation could be given for two days in December and two days in January, just before session.

After more discussion, staff was directed to draft proposals to provide for longer orientations that take place at different times and that include more substantive discussions.

Staff was also directed to investigate any possible constitutional constraints regarding compensating legislators-elect before they take office.

The task force recessed at 3:55 p.m.

Tuesday, July 24

The task force reconvened at 9:10 a.m.

Legislative-Executive Relations: Subpoena Powers

Ms. Tackett gave a presentation on legislative subpoena powers. She said that although there is no specific vested subpoena power vested in the legislature in the Constitution of New Mexico, there is an implied power. As stated by the Supreme Court of New Mexico, "... deeply rooted in American jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each". *State ex rel. Hovey Concrete Products Company, Inc. v. Mechem*. The Supreme Court of New Mexico in one pertinent case assumed that an agency, which would include the legislature, does have such a power, but needs to follow certain guidelines. The court ruled in *State ex rel. Governor's Organized Prevention Commission v. Jaramillo* that if the body issuing the subpoena is accusatory in nature (e.g., the judiciary), then the body needs to comply with probable cause requirements of the Fourth Amendment to the United States Constitution, but that an investigatory body (in this case the Governor's Organized Crime Prevention Commission) did not need to show probable cause to issue a subpoena. The investigatory body does, however, still need to follow the usual procedural due process safeguards as well as constitutional guarantees of freedom of speech and association and the privilege against self-incrimination. Additionally, the court further stipulated, based on federal case law, that "the inquiry must be within the authority of the agency; the demand must not be too infinite; and the information must be reasonably relevant to the purpose of the investigation".

Ms. Tackett said that the legislature has specific statutory subpoena power during regular and special sessions, and the LFC has subpoena power at any time. She said that the LFC did issue a subpoena once to the former State Highway and Transportation Department for a very limited inquiry. Ms. Tackett cited a report by the National Conference of State Legislatures that said very few states use their subpoena power often.

Mr. Abbey told the task force that the LFC usually gets all the information it needs by just asking for it. Sometimes legislators get frustrated with an agency and demand a subpoena, but the LFC always eventually gets the information it requests. Last year, the LFC came close to issuing a subpoena to the State Personnel Office, but the information it was requesting was eventually received. Mr. Abbey said that the LFC does not use its subpoena power to go on "fishing expeditions". It will only subpoena entities for specific information that is based on a reason to investigate.

Mr. Coll agreed with Mr. Abbey, saying that the threat of a subpoena is more useful than an actual subpoena.

Representative Wirth said that, last year, the interim Courts, Corrections and Justice Committee was very frustrated with some cabinet secretaries, who declined even to show up to its meetings to answer questions. He wondered whether the subpoena power could be given to some interim committees or if the LFC could in some situations subpoena an agency or person on behalf of another interim committee.

Senator Altamirano said that the audit functions of the LFC should be expanded, but the subpoena power should be left as it is. Mr. Coll agreed, and said that the legislature should do the state's audits, rather than letting state agencies hire their own auditors, who tend not to find any problems with their employers.

Mr. Coll said that the legislature needs the practical ability to override vetoes and the ability to subpoena. He favors eventually strengthening the legislature's subpoena powers.

Senator Rodriguez said that an LFC audit is only as good as the information received from the entity. She said that agencies often claim that the information requested is not available. She asked whether the LFC has the power physically to inspect an agency's premises. Mr. Abbey said that if the agency does not cooperate, then it can issue a subpoena, which forces an agency to provide the information.

Representative Bratton said that the governor often vetoes language that requires the executive to provide information to the legislature on the operation of the program it is funding. He said that the legislature has the right to know whether the money it appropriated is being spent appropriately, and asked how the legislature could ensure that it gets the information. Mr. Abbey agreed, but said it is tricky to make an appropriation contingent upon the executive reporting information. He said that if the governor vetoes information language, the LFC usually doubles its efforts to get that information anyway. Ms. Tackett suggested not putting any language into the general appropriation act relating to reporting requirements, but that the LFC should just ask for that information pursuant to its existing statutes.

Performance Auditing and Legislative Oversight

Mr. Patel described for the task force the LFC's performance auditing function. New Mexico is one of 29 states that has an auditing function within the legislature. New Mexico also combines its auditing function into the budgeting process. He described some of the previous audits of state agencies, which resulted in the reorganization of some of those agencies.

Representative Arnold-Jones asked if most agencies cooperate with the audits. Mr. Patel said they usually do, and that they usually appreciate the results of the audit. Sometimes an agency does not know where information is that the LFC is requesting, and the LFC helps the agency organize it. Representative Arnold-Jones said that she has been requesting an information technology (IT) audit of state government for five years, but it has not happened.

Mr. Abbey said that the state does not have that information, but the new Department of Information Technology should be able to manage IT better in the future. He agreed that IT resources have not been managed well in the past.

Representative Arnold-Jones asked whether the LFC is able to perform forensic audits. Mr. Patel said if there is suspicion of criminal activity, the LFC would notify the Attorney General's Office, which would be the appropriate entity to do such an investigation.

Representative Larrañaga asked about the LFC's power to audit school districts, particularly the Albuquerque Public Schools (APS). Mr. Abbey said that Section 2-5-3 NMSA 1978, which essentially allows the LFC to audit state agencies, also applies to all political subdivisions of the state. Representative Larrañaga suggested an intense audit of APS, which has a huge budget but only a 52% graduation rate. Mr. Patel said that the LFC is working with the Legislative Education Study Committee (LESC) and the Office of Education Accountability of the Department of Finance and Administration to look at expenditures and cost-categorization by APS. He said the LESC will have a hearing on the issue in October. Mr. Patel said that APS is fully cooperating with the LFC in its review.

Mr. Williams asked what other tools the LFC or legislature needs to enhance its audit abilities. Ms. Tackett said that there are other interim committees with the charge of overseeing various agencies, and those committees might benefit from the subpoena power. She indicated that one problem that can occur is that the oversight committees can become captive to the agency's agenda, and cease to provide effective oversight, so changing the committee membership might help.

Senator Ortiz y Pino asked whether the legislature should enact a law that allows the LFC to provide for a program evaluation function, similar to the state auditor's ability. Mr. Patel said that the LFC would recommend such a statutory change. Senator Ortiz y Pino asked staff to draft language that would address performance evaluation, and to include related confidentiality provisions in the language.

Legislative-Executive Relations: Budget Deadlines and Agency Cooperation

Ms. Fernandez discussed with the task force statutory deadlines for the executive agencies to submit their budgets. She said that the September 1 deadline for state agencies to submit budgets to the Department of Finance and Administration and to the LFC is almost universally complied with. She mentioned the early January deadline in which the governor is required to submit to the legislature the executive's final budget request.

Ms. Fernandez also discussed executive and legislative initiatives that do not go through the budget process. Many of these initiatives create new programs that need recurring funding, but they never get any review. Some programs appropriate money from sources outside of funding formulas, which tends to diminish the integrity of those formulas. She also reminded the task force that salary increases for state employees are supposed to be in Section 8 of the general appropriation act, but that many increases are tacked onto other bills.

Ms. Gregorio talked about the capital outlay process and the changes made last year based upon recommendations of the interim Capital Outlay Subcommittee. One of the keystones of the changes was to implement a schedule for the capital outlay bill to be passed, which required the executive to submit its capital outlay budget earlier. Ms. Gregorio also described some of the changes that made the capital outlay process more efficient. She said that although the capital outlay process was improved by setting up project requirements, at present there are no consequences if those requirements are not met. Finally, she described how the legislature has made a step toward funding capital outlay projects based on need-based and planning criteria, rather than political influence.

Representative Bratton said that the legislature has made some progress in the capital outlay process, but still has much work to do. He said that he does not like the current House process of parading people in front of the Capital Outlay Subcommittee of the House Taxation and Revenue Committee, when he believes their testimony has absolutely no bearing on the funding of the project.

Representative Arnold-Jones said that the capital outlay time line worked last session. She also said that the New Mexico Finance Authority does much of the same work that the legislature sees, and that entity may be better equipped to evaluate capital projects than the legislature.

Representative Wirth said that since the governor tells state agencies to submit flat budgets, they end up asking for additional appropriations in HB 2, Jr. Many of those programs really should go through the budget process. Mr. Abbey said that he will suggest to the LFC and standing finance committee chairs that they be more restrictive in accepting nonbudgeted agency requests. Ms. Fernandez said the LFC makes sure that existing programs are funded before recommending new initiatives.

Representative Arnold-Jones asked if the state is paying arbitrage penalties on unfinished capital outlay projects. Mr. Abbey said that the state is, but it was never legally entitled to that interest money. He said the real problem is that several critical projects keep getting stalled for various reasons, including inadequate funding.

Representative Bratton said that the process of legislators funding multiple projects with inadequate money really amounts to buying votes. He said that project funding should not be associated with legislators' names.

There being no further business, the task force adjourned at 11:50 a.m.